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No. 913

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

JOHN LOOKRETIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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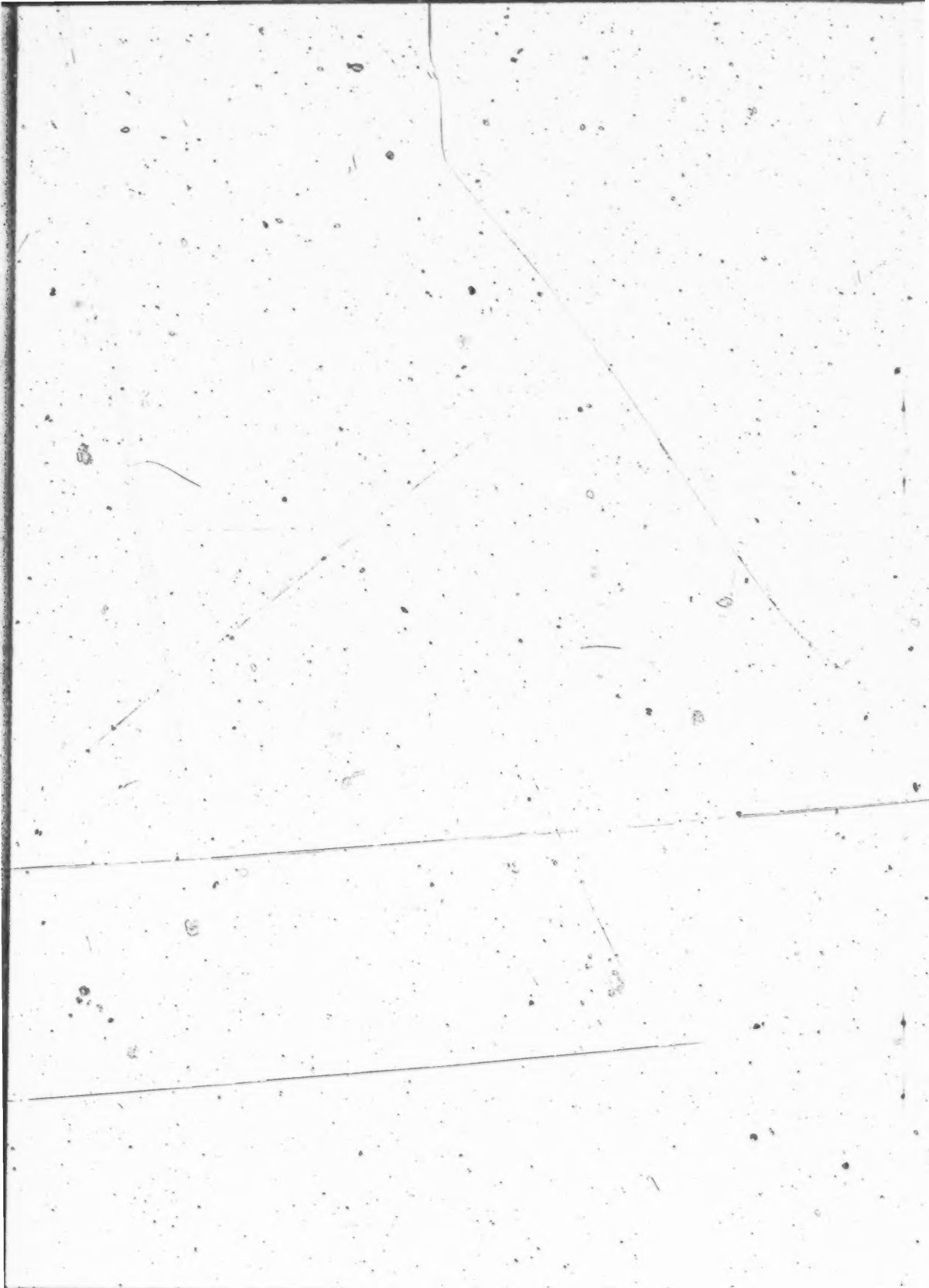

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To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, John Lookretis, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURT BELOW.

The original opinion issued October 11, 1967, and a Petition for Rehearing was denied on November 15, 1967. The opinion of the United States Court of Appeals is not yet reported, but is set out in full in the Appendix hereto, and the order denying the Petition for Rehearing is also included in the Petitioner's Appendix hereto, and both have been certified to this Court in the Record transmitted by the Clerk of the Court of Appeals for the Seventh Circuit.

STATEMENT OF JURISDICTION.

The order of the United States Court of Appeals for the Seventh Circuit affirming the judgment of the United States District Court for the Northern District of Indiana, Hammond Division, was filed on October 11, 1967, and a Petition for Rehearing was denied on November 15, 1967. This Petition for Certiorari is filed within 30 days after the denial of the Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Where the Petitioner merely rented, during the baseball season, a sports ticker tape from the Western Union Company and had no part in the operation or control of said sports ticker machine, other than to take from it the tape containing the results of sports events including baseball, for the edification of his customers, and not for determination of result or pay-off on any gambling event, was it error for the Court of Appeals to affirm the District Court in finding that there was a "*use* of a facility *in* interstate commerce" by the Petitioner, that is, the wire facilities of the Western Union Telegraph Company as alleged in the indictment?

2. Was not the construction that the Petitioner *used* the facility *in* interstate or foreign commerce by the Courts below erroneous? But, if correct, is not the Statute unconstitutional as failing to give appropriate warning in the case at bar, since the defendant's only action was to receive news from a device used by the Western Union Telegraph Company to transmit news, to wit, a sports ticker?

3. Is not this case governed by the decisions of this Court, granting certiorari in *Marchetti* v. *United States*, No. 2, October Term, 1967, and *Grosso* v. *United States*, No. 12, October Term, 1967, heretofore argued and reargued at this term of Court and now awaiting decision since, in the case at bar, Paragraphs 1 and 3 of the Stipulation of Facts, relied upon for decision below, read as follows:

> "1. That public records, federal tax returns and federal tax stamp application, if introduced, would establish that the defendant John Lookretis was, on the 20th day of July, 1965, and for some time prior to said date, a business partner of one Anthony Oppolo in a business enterprise known as the Forsythe Club, 4610 Indianapolis Boulevard, East Chicago, Indiana, and that he has remained a partner in that business continuously up to the present time.
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> "3. That Delbert Hopkins, Internal Revenue Service, would testify and produce documentary evidence to the effect that on June 24, 1965, the defendant John Lookretis signed and filed a Form 11-C Application for Registry and Wagering, listing himself and the said Anthony Oppolo as partners in the Forsythe club, and that thereafter United States Special Wagering Tax Stamp Number 7457 was issued to John Lookretis and Anthony Oppolo, Forsythe Club, for the period from July 1, 1965, to June 30, 1966."

4. Does the requirement to register and pay the occupational taxes under Sections 4411 and 4412 of T. 26, U.S.C. violate the Fifth Amendment's prohibition against compulsory self-incrimination?

STATUTES AND CONSTITUTIONAL SECTIONS INVOLVED

Title 18, United States Code.

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

First Amendment to the Constitution of the United States:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacably to assemble, and to petition the Government for a redress of grievances."

Fifth Amendment to the Constitution of the United States:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

The Court of Appeals below affirmed a judgment of conviction and a sentence of imprisonment in the custody of the Attorney General for five years on each Count of a three-count indictment, six months of the sentence to be served and the balance of four-and-a-half years suspended with defendant placed on probation for the four-and-a-half years; and said sentences to run concurrently. Thus, the sentence to custody was six months and to probation was four-and-a-half years (A. 41, 42).

The case was tried upon a stipulation of facts and exhibits admitted by stipulation of the parties, before the trial judge without a jury (A. 2).

The indictment was returned on December 9, 1965, and the first Count charged that on or about July 20, 1965 at East Chicago, Indiana, the defendants, "John Lookretis and Anthony Opollo did use a facility in interstate commerce, to wit: the wire facilities of the Western Union Telegraph Company, which facilities operated between Chicago, State of Illinois, and East Chicago, State of Indiana, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling offenses, that is to say, gambling, betting and wagering on sporting events, in violation of Burns Indiana Statutes (1956 Replacement), Sections 10-2304, 10-2307, 10-2310, 10-2311, 10-2331, and 10-2333, and that said defendants did thereafter perform and attempt to perform acts in the Northern District of Indiana to promote, manage, carry on, and establish the said unlawful activities, all in violation of Title 18 U.S.C. Sections 1952 and 2." (A. 3).

Count 2 charged the same offense in the same language except that the date of the offense charged was July 21, 1965, and Count 3 charged a similar offense on September 28, 1965 (A. 3, 4).

As stated above, the trial was had upon a stipulation of facts filed on the trial date, September 1, 1966. This stipulation appears on Pages 11 through 20 of the printed Appendix, and Government Exhibits 1, 2, 3, 4, 5 and 6 were admitted into evidence by stipulation (A. 29, 30). The defendants' exhibits 1, 2, 3, 4, 5 and 6 were also received into evidence without objection (A. 29).

All "A." references are to the Appendix printed for use of the Court below, which has been certified to this Court.

It is stipulated that the Western Union installed and serviced the facility, that is, the ticker tape machine and the wire connected with it from the Hammond office to the defendant's place of business in East Chicago, both in Indiana (A. 12, 14, 27, 28; Deft's. Exs. 1, 2, 3, 4, 5; A. 34-38).

The defendant's contract with the Western Union Telegraph Company did not give him any operational or other use authority over any Western Union material or property. The contract was for the supply of the news specified in the contract, which was the Western Union News Sports Service which is included in the news furnished to newspapers of general circulation for their use (A. 27).

The defendant dealt only with the Western Union Telegraph Company at East Chicago, Indiana, as demonstrated by the Deft's. Exs. 1 through 5 (A. 34-38). The stipulation shows that the defendant contracted for the supplying of "sports information" via Western Union ticker tape facilities. It is further stipulated that a representative of the Western Union Telegraph Company, if called to testify, would say that all sports scores from around the United States, including scores and statistics of professional baseball games, are gathered and compiled in Chicago, Illinois. Thereafter, they are sent out of Western Union facilities to various areas of the country including East Chicago, Indiana. It is arguable that this information comes to rest in Chicago, where it is edited and assembled and determined where it shall be sent (A. 13).

It was further stipulated that Donald Black would testify that he is a supervisor in the maintenance department of the Western Union, and that he installs and services Western Union ticker tape machines in East Chicago, Gary and Hammond, Indiana. Black would testify that the news which came to the defendant's place of business in East Chicago, Indiana, came by a land wire which ran from the Western Union office in East Chicago, Indiana to the defendant's place of business (A. 13). Thus, it is doubtful that the very device or ticker was an interstate facility, although it is conceded that it was connected to a feeder machine which received the news via Western Union land wire from Chicago, Illinois. It is upon this tenuous ground that the interstate facility claim of the government is founded.

From the stipulation of the facts, the conclusion can be drawn that the baseball pool operated was a lottery. That is, the purchaser of a ticket in the pool drew the names of the baseball teams whose scores would determine whether he was a winner by chance. It was clear that Lookretis could not safely pay any winners until the results of the last night baseball games were in. It was argued that the Western Union service terminated at or before 11:00 P.M. each day, and that the West Coast night games, that is, Los Angeles and San Francisco night games at home, were not completed in time for delivery of their final scores by the Western Union service. Thus, the Western Union sports news purchased by Mr. Lookretis, did not enable him to operate and pay winners on his baseball pool. The high and low scoring teams as shown on winning tickets were determined by the scores as carried by the morning newspapers for the day following the sale of the baseball pool tickets.

While this is conceded by the government, it was contended below that because of the availability of sports news, that is, early baseball scores of some teams, customers apparently would be enticed into the purchase of more tickets, because, having bought a ticket and finding that one's score was between low and high scores already returned, a purchaser might determine he was a loser and therefore buy another ticket. This "iffy" argument does not contemplate the just as natural reaction by a purchaser who had determined he was a loser, and that he should not throw good money after bad. No purchaser described by the stipulation, that is, Special Agents Sease (A. 14), Tengstedt (A. 15), McCreight (A. 17), Bethune, Jr. (A. 17), or citizen Julius Marcinek (A. 18), apparently succumbed to the temptation suggested by the prosecutor in argument below, and no such custom was established by the evidence.

The defendant Lookretis was not a user of Western Union interstate facilities, but was merely the purchaser and recipient of news, which was delivered to him by the Western Union Telegraph Company, which was the only *user* of its facilities. Lookretis was not like a telephone subscriber who lodges a call or uses the telephone instrument and controls the operation of the instrument and its transmission of messages to him or from him. Lookretis was simply the recipient of news delivered to him through a device operated, maintained and controlled by the Western Union Telegraph Company, and which he did not start or stop, but from which he merely received a paper tape with news that he desired to know printed upon it.

REASONS FOR GRANTING THE WRIT

This Court should issue its Writ of Certiorari to review the decision of the Court of Appeals for the Seventh Circuit for the following reasons:

1. Although the case at bar involves the Fifth Amendment rights of this Petitioner in the way that this Court is now considering infringement of the Fifth Amendment rights of the Petitioners in the *Marchetti* case and the *Grosso* case, Nos. 2 and 12 respectively, October, 1967 Term, and now pending decision by this Court, the Court of Appeals below refused to consider this issue, and this Petitioner is without remedy unless this Court grants Certiorari and disposes of this case with the *Marchetti* and *Grosso* cases, or grants Certiorari to consider the facts for the effect of those decisions or whether they may be distinguished from the case at bar.

2. The facts stipulated on the trial in the District Court present a situation where the Department of Justice and the Courts below have afforded Section 1952 T. 18, U.S.C. an interpretation which is unconstitutional, or if correct, renders the statute unconstitutional for failure to give adequate notice of its criminal conduct under the statute, and thus have decided a case contrary to decisions of this Court.

3. The Court of Appeals below made an assumption that there were sufficient facts without consideration of the stipulated evidence concerning the application and issuance of Federal Wagering Tax Stamps showing the Petitioner to be a partner in operation of the Forsythe Club during a period which includes the dates of the offenses

charged; and that "public records, Federal tax returns, and Federal Tax Stamp application established that during the period of the offenses, the defendant was a business partner in the enterprise known as the Forsythe Club" to sustain a finding of guilt. It has thus substituted its judgment for that of the District Court without appraising the effect of this unconstitutionally obtained evidence upon the trial judge who was the finder of fact.

ARGUMENT

Western Union Telegraph Company was not indicted and apparently was not considered by the United States to be a violator of Section 1952, Title 18. Use of the facility *in interstate commerce* is a requisite of the offense charged here, and it is obvious that the Western Union Telegraph Company did not engage in interstate commerce or use its facility in interstate commerce with the intent to promote, etc., a business enterprise involving state offenses, nor was it so conceived by the government. The Western Union's right to disseminate the scores of baseball games and other sports news cannot be doubted. Its First Amendment rights in this respect would appear fairly clear. *United States* v. *Kelly*, 325 F.2d 148. It is the position of the defendant that the First Amendment protects the right to the dissemination of this sports news regardless of the statute involved here, or Section 1084, Title 18, U.S.C. Certainly, there must be some line at which the ingenuity of prosecutors must be halted, else every pencil and every scrap of paper ever transported in interstate commerce or purchased after transportation in interstate commerce via rail or air or water may trigger a prosecution for the use of a facility (railroad, plane or ship) in interstate commerce with intent to promote a gambling business.

If it is argued that in such a case the commerce would have ceased, so had it ceased in the case at bar. The paper tape in the hands of Lookretis, carrying baseball scores, was not a factor of interstate commerce. It was a paper with printed news upon it, printed under the protection of the free press provision of the First Amendment.

The dissemination of this news by Lookretis was protected by the same First Amendment's provision for free speech. It did not govern the determination of winners, it did not aid or facilitate his gambling business, any more than a television broadcast of a baseball game, or as much as a copy of the Gary Tribune would do.

The complete failure of the Western Union Telegraph Company to comprehend from this statute that it was a principal in the violation of this statute is exhibited by its letter, Deft's. Ex. 6. This letter, intended by a company with broad experience in the communication of news, to excuse itself from any intention to violate the law, obviously does not contemplate that it was in any danger of having violated Section 1952, Title 18, U.S.C., which was adopted and became effective September 13, 1961. The stipulation shows that the ticker tape machine annually had been installed in Lookretis' pool room for many years. Four-and-a-half years passed before the government saw fit to construe this statute as applying to the purchase of news service by Lookretis.

The purchase of wagering stamps by the filing of Form 11-C applications for registry and wagering by Lookretis and his partner, Opollo, was relied upon by the government in proof of the gambling aspects (A. 12). Certainly, this disclosure of the nature of his gambling business to the government was not consistent with any belief or intent by Lookretis that he was a violator of a federal statute and a user of interstate facilities *in* interstate commerce by reason of being the recipient of the news of results of baseball games. There is no evidence of scienter on the part of Western Union or Lookretis. "Without the knowledge, the intent cannot exist." *Direct Sales Company* v. *United States*, 319 U.S. 703, 711. This Court has said that one cannot aid and abet himself, *Horton* v.

United States, C.A. 7, 180 F.2d 427, and see *Ingram* v. *United States,* 360 U.S. 672. Thus the inclusion of Section 2, Title 18, U.S.C. as a statute purported to be violated, does not assist the prosecution or support conviction.

Western Union installed the apparatus, serviced it, and controlled it, and was its only user. Western Union knew the nature of the defendant's business but obviously had no knowledge or intent to violate Section 1952, Title 18, U.S.C. under its own construction of the statute and under the construction of the statute by the United States. Nor did Lookretis have such knowledge and intent. Of course, Lookretis could not aid and abet himself.

There is no explanation of the degree of reliance placed by the District Court upon Paragraphs 1 and 3 of the Stipulation of Facts, regarding the application and issuance of gambling stamps to the Petitioner. However, these items of the Stipulation commanded a high place in the consideration of the prosecutor, as evidenced by their prominence in the stipulation.

If this Court's review of *United States* v. *Kahriger,* 345 U.S. 22, and *Lewis* v. *United States,* 348 U.S. 419, determines that the Federal Wagering Tax Stamp laws are unconstitutional and do violate the Fifth Amendment's privilege against self-incrimination by requiring the reporting of criminal conduct, then the conviction in this case should be reversed and remanded for new trial.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner.